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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIFFANY LYNN NUNLEY-HATZENBUHLER, Defendant and Appellant.	G042197 (Super. Ct. No. 08CF1517) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Kevin J. Phillips and Kristin A. Erickson for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

Tiffany Lynn Nunley-Hatzenbuhler (Nunley) appeals from her conviction on one count of felony vandalism. (Pen. Code, § 594, subds. (a) & (b)(1).) The trial court found a witness's lack of memory at trial about her earlier statements to police identifying Nunley as the culprit were feigned and admitted them as prior inconsistent statements. (Evid. Code, § 1235.)[1] Nunley contends the court had a sua sponte duty to instruct the jury that if it found the witness's memory loss was not feigned, it could not consider the statements as substantive evidence. We reject her contention and affirm the judgment.

FACTS

On February 10, 2008, Melissa McCormack drove to the Orange County Jail to visit her boyfriend, Jason Hallstrom. A friend, Karen Birtcher, and Birtcher's daughter went with her. While waiting for Hallstrom to be brought to a visiting room, McCormack saw Nunley, Hallstrom's ex-girlfriend, checking in as well. When Nunley turned around, she looked at McCormack, mouthed "You are fucked," and left.

McCormack's visit with Hallstrom ended about 30 minutes later. She returned to her car, a 2004 silver Toyota Corolla, to find one of the tires deflated and the car had been "keyed." McCormack called the police and told them she thought Nunley was probably the one who damaged her car. The police officer who spoke with McCormack contacted Nunley later that day. Nunley admitted knowing McCormack drove a silver Toyota Corolla (or something similar), and she said McCormack was the cause of her break up with Hallstrom.

The next weekend, McCormack went to the jail again to visit Hallstrom. Madelynn Alfonso approached McCormack in the parking lot and told McCormack she saw a tall blond woman messing with McCormack's car the prior weekend. Alfonso

[1] All further statutory references are to the Evidence Code, unless otherwise indicated.

described a person who looked like Nunley. McCormack got Alfonso's telephone number and gave it to Santa Ana Police Detective David Angel.

Prior to trial, the court conducted a section 402 hearing to determine the admissibility of alleged prior inconsistent statements Alfonso made to Angel should she testify she could not remember the incident. At the hearing, Alfonso testified the prosecutor interviewed her a few days before trial and showed her a written statement she made to Angel. Alfonso told the prosecutor she had no memory of the February 10 incident, and the statements contained in the report did not refresh her recollection. She agreed the signature on a photo line-up admonishment was hers, as were the initials on the six-pack photographic lineup, on which the photograph of Nunley was circled.

Alfonso claimed her memory loss was due to personal tragedy in her life—one close friend had committed suicide, another was murdered, and another recently died. Alfonso also said her memory loss was due to drug problems and medication she took following her friend's murder. Alfonso could not remember making any detailed statement to Angel and had no memory of the incident. She did not know if she was under the influence of drugs or not when she spoke with Angel.

The trial court found Alfonso's claim of memory loss "[was] other than legitimate[.]" It ruled the prior statements attributed to her were inconsistent with the feigned loss of memory and, thus, admissible pursuant to section 1235.

Alfonso was called as a witness for the prosecution at trial. She testified that in February 2008, she regularly went to the Orange County Jail to visit a friend, and while there she might have come in contact with McCormack and Birtcher. Alfonso could not recall seeing anything while sitting in her car in the jail parking lot on February 10, seeing a tall blond vandalize a car, or telling McCormack she had seen someone vandalizing her car. Alfonso recalled a police officer coming to her residence in May 2008, to talk about the case, but she could not remember the officer or having a conversation with the officer. Alfonso could not recall making any specific statements to

Angel about the February 10 incident. Alfonso could not recall seeing a photo-lineup or a photo line-up admonishment, but agreed initials on both were hers. Alfonso did not recognize Nunley at trial.

Angel testified he interviewed Alfonso at her residence in May 2008. Alfonso told Angel she was sitting in her car in the jail parking structure waiting to visit someone when she heard scratching. She looked around and saw a tall blond female with her hair pulled back, moving her hands toward the rear of a silver Toyota simultaneously with the scratching noise. Alfonso thought someone was vandalizing the car, and she watched the woman for a couple of minutes. When people approached, the woman looked in their direction, started walking in the opposite direction, and after passing a couple of cars, started running. Alfonso got out of her car and followed the woman to a dark gray GMC Yukon. The woman got into the Yukon and drove away. Alfonso told Angel she saw McCormack in the parking structure the next week standing next to the vandalized Toyota. Alfonso said she approached McCormack and told her what happened because she did not want the culprit to get away with her act and Alfonso hoped someone would come forward if the same thing happened to her car.

Angel showed Alfonso a six-pack photograph line-up, and she identified a photograph of Nunley as the person she saw vandalizing the Toyota. Alfonso circled the photograph, and initialed and signed the line-up.

Angel spoke with Nunley as well. Nunley admitted she drove a dark gray GMC Yukon. Nunley told Angel she had gone to the jail on February 10 to visit Hallstrom, but because he already had a visitor, she could not. She knew McCormack was the visitor because she saw McCormack's car in the parking structure. Nunley admitted she was angry with McCormack. Nunley and Hallstrom had been together for 10 years and had a child together. Nunley believed McCormack caused their break up. Nunley and McCormack previously had several verbal altercations. Nunley told Angel

she hated McCormack and wanted to "beat her ass." Nonetheless, Nunley denied vandalizing McCormack's car.

Defense

Birtcher, who had been with McCormack on February 10, was friends with Nunley and Hallstrom as well, and was no longer friends with McCormack. She often went with McCormack to the jail, and would often see Alfonso there. Birtcher denied seeing Nunley at the jail on February 10.

Birtcher testified McCormack assumed Nunley vandalized the car, but there was another woman Hallstrom was dating, with whom McCormack also had a problem, and she also matched Alfonso's description of the woman she saw. When Birtcher later asked McCormack why Alfonso identified Nunley, McCormack said she had faxed Alfonso Nunley's picture (which McCormack denied doing at trial). McCormack said she just wanted to get her car fixed and Nunley might as well be the one to pay because they did not like each other. Birtcher testified Alfonso told her McCormack had faxed her a photograph of Nunley, and Alfonso agreed to help McCormack out by wrongly identifying Nunley to the police. Alfonso told Birtcher she was scared because either she would commit perjury if she testified consistent with her police interview, or get in trouble for having lied to the police.

The jury found Nunley guilty of felony vandalism. (Pen. Code, § 594, subds. (a) & (b)(1).) The trial court suspended imposition of sentence, and placed her on three years formal probation, and entered a protective order directing Nunley to have no contact with McCormack.

DISCUSSION

Nunley contends her due process rights were violated by admission of Alfonso's statements to Angel without giving an instruction to the jury that if it found her memory loss was not feigned, it could not consider the statements. We disagree.

The admission of a prior inconsistent statement in a criminal case is permitted by section 1235[2] and does not violate a defendant's constitutional rights. (See *People v. Zapien* (1993) 4 Cal.4th 929, 955-958.) "A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in . . . sections 1235 and 770. The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220, fn. omitted.) Such testimony should be admissible under section 1235, even where the witness professes no recollection at all of the underlying events or of having made the statements. (*People v. O'Quinn* (1980) 109 Cal.App.3d 219, 226.)

Whether the requisite facts exist to permit admission of statements under an established hearsay exception is a determination vested in the trial court's discretion. The exercise of that discretion will not be disturbed on appeal unless the court's decision is not supported by a preponderance of the evidence. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 966 & fn. 13; *People v. Rios* (1985) 163 Cal.App.3d 852, 863.) On

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[2] Section 1235 provides, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [s]ection 770."

appeal, an appellate court applies the abuse of discretion standard to a trial court's ruling on the admissibility of evidence, including a ruling that turns on the hearsay nature of the evidence at issue. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) "[T]o admit the prior extrajudicial statement of a forgetful witness as an inconsistent statement, the forgetfulness must be feigned rather than the consequence of a float through the waters of Lethe. The determination is for the trial court, which we affirm if there is a reasonable basis in the record for its conclusion. [Citation.]" (*People v. Gunder* (2007) 151 Cal.App.4th 412, 418 (*Gunder*).)

Nunley does not dispute there was a reasonable basis for the trial court's determination Alfonso's memory loss was feigned. But Nunley contends the court nonetheless had a sua sponte duty to instruct the jury if it found Alfonso's memory loss was not feigned, it could not consider Alfonso's statement to Angel as substantive evidence of Nunley's guilt. She argues the absence of such an instruction essentially took the issue of witness credibility away from the jury. We disagree.

Whether a witness's memory loss at trial is feigned, making her prior statement admissible under section 1235, is a preliminary factual determination to be resolved by the trial court in the first instance. "A preliminary fact is one upon 'the existence or nonexistence of which depends the admissibility or inadmissibility of evidence.' (. . . § 400.) . . . [S]ection 405 vests the court with the authority to make certain determinations as to the existence or nonexistence of preliminary facts and admit or exclude proffered evidence on the basis of those determinations. In such situations, the judge's determination is final and where the ruling is to exclude the evidence, it does not go to the jury." (*People v. Chapman* (1975) 50 Cal.App.3d 872, 879 (*Chapman*).) Indeed, section 405, subdivision (b), provides, if the preliminary fact is an issue in the action, "(1) The jury *shall not* be informed of the court's determination as to the existence or nonexistence of the preliminary fact. [¶] (2) If the proffered evidence is admitted, the

jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact." (Italics added.)

Nunley argues the preliminary fact determination of the witness's feigned memory loss is one resolved under section 403. That section governs the trial court's determination of preliminary facts when, among other things, "(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony; . . . ." When evidence is admitted under section 403, "(c) . . . the court: [¶] (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist."

But as noted in *Chapman, supra,* 50 Cal.App.3d at page 879, footnote 1, "According to the comment by the Assembly Committee on the Judiciary contained in West's Annotated California Code on Evidence at pages 277-279; 'Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion. . . . When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration — was the statement actually made by the person alleged to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence . . . . Under this code, questions relating to the authenticity of the proffered declaration are decided under [s]ection 403. . . . But other preliminary fact questions are decided under [s]ection 405.'" Here, although the question of whether Alfonso actually made the statement (i.e., Angel's personal knowledge of the statement) might be governed by section 403, whether the hearsay statement was sufficiently trustworthy to merit receipt into evidence was a question for the trial court alone.

The lack of the jury instruction Nunley urges did not deprive her of her due process rights. Nunley argues by admitting Alfonso's prior statement, and not requiring the jury to decide if her memory loss was feigned before it could be considered, took the issue of witness credibility from the jury. (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480 [witness credibility issue for jury].) We disagree. Because the witness feigning memory loss is subject to cross-examination, the jury is provided "the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement's credibility." (*Gunder, supra,* 151 Cal.App.4th at p. 420.) Both Alfonso and Angel were subject to cross examination. The court's conclusion Alfonso's memory loss was feigned was never conveyed to the jury, and the jury was instructed it alone decided witness credibility.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.